No. 87-6325

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

DONALD RAY PERRY,

Petitioner,

versus

WILLIAM D. LEEKE, COMMISSIONER, South Carolina Department of Corrections, and THE ATTORNEY GENERAL OF SOUTH CAROLINA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

WHETHER THE COURT OF APPEALS PROPERLY APPLIED THE HARMLESS ERROR ANALYSIS WHERE THE RECORD REVEALS THAT THERE WAS NO PREJUDICE FROM ONE BRIEF SEQUESTRATION OF THE PETITIONER FROM HIS COUNSEL DURING A NON-ROUTINE BREAK BETWEEN HIS DIRECT AND CROSS - EXAMINATION?

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STATEMENT OF THE CASE

This matter arises from a petition for a writ of habeas corpus filed by South Carolina inmate Donald Ray Perry. The Petitioner was convicted on October 3, 1981, in Richland County, South Carolina, for murder, kidnapping, and

criminal sexual conduct in the first degree, and is presently serving a sentence of life imprisonment for murder and thirty (30) years for criminal sexual conduct. He sought the writ of habeas corpus on the ground that he was not permitted to confer with counsel during a fifteen-minute trial recess between direct and cross - examination. The Court of Appeals, en banc, held that because any error at the state trial did not prejudice Perry under the standard established in Strickland v. Washington, 466 U.S. 668 (1984), it reversed the judgment of the federal district court and remanded with instructions to dismiss the petition. (J.A. p. 21).

On March 5, 1981, Dr. Mary Heimberger had dinner with two friends in Richland County, South Carolina. After having dinner, she left alone in her own automobile. (Tr. pp. 3-6). Dr.

Heimberger's associates became alarmed the next day when she failed to report for work. (Tr. pp. 11-21, 31-36). Police officers were notified and began a preliminary investigation of her disappearance. (Tr. pp. 108-111).

Two young boys found her body on March 7, 1981, in a wooded area and notified the authorities. (Tr. pp. 157-158, 162, 164). Donald Ray Perry's fingerprint was later found on Heimberger's car; tire tracks from Perry's car were found on the scene, as were prints of Perry's shoes. After police arrested Perry, he confessed that he had shot Heimberger, but said it was an accident.

A medical examination of Heimberger's body indicated that someone had raped her, attempted to strangle her, shot her in both kneecaps, and then shot her fatally in the chest. The

entrance to her vagina had been bruised and torn. Following her death, she was subjected to further post-mortem abuse.

Donald Ray Perry was indicted during the August, 1981, term of the Court of General Sessions for Richland County for the offenses of murder, kidnapping, and criminal sexual conduct in the first degree. (Tr. pp. iii-viii). The Solicitor of the Fifth Judicial Circuit, the Honorable James C. Anders, gave timely notice to the Petitioner of his intention to seek the death penalty in accordance with South Carolina law. Further, W. Gaston Fairey (present counsel before this Court), and Edward Mullineaux were appointed by the trial court to represent Mr. Perry in his trial.

On September 21, 1981, the trial commenced in Richland County before the Honorable Julius H. Baggett, Circuit

Judge of South Carolina. Eight (8) days later, a short recess was held during the Petitioner's testimony that is the primary subject to his appeal. (J.A. pp. 3-5). On October 2, 1981, the jury found the Petitioner guilty of murder, kidnapping, and criminal sexual conduct.

Pursuant to the South Carolina Death Penalty Act, a bifurcated sentencing proceeding was held. After further testimony was introduced by the defense (Tr. pp. 1196-1212), the jury recommended a sentence of life imprisonment for murder rather than the death penalty. On October 5, 1981, Judge Baggett sentenced the Petitioner to life imprisonment for murder, life imprisonment consecutive for kidnapping, and thirty (30) years consecutive for criminal sexual conduct in the first degree.

The Petitioner timely filed a notice of intention to appeal to the South Carolina Supreme Court on October 12, 1981. The Petitioner was represented in the appeal by David W. Carpenter of the South Carolina Commission on Appellate Defense, as well as his trial counsel. Among others, the Petitioner raised the following as an exception:

> I. The trial court erred in violation of the Sixth and Fourteenth Amendments to the United States Constitution and the State right to counsel afforded by the Defense of Indigents Act, when the court denied appellant access to counsel during a recess of court between appellant's testimony on direct examination and cross-examination.

(Tr. p. 1346). On January 3, 1983, the South Carolina Supreme Court issued its opinion, written by Associate Justice Littlejohn, upholding the conviction and rejecting the argument of the Petitioner. State v. Perry, 278 S.C.

490, 299 S.E.2d 324 (1983). (J.A. pp. 8-16). The Petitioner made a petition for certiorari to the United States Supreme Court on this same issue. On April 25, 1983, the Court issued its order denying the petition for certiorari. Donald Ray Perry v. South Carolina, No. 82-6336, 461 U.S. 908, 103 S.Ct. 1881, 76 L.Ed.2d 811 (1983).

On November 11, 1985, the Petitioner, with the assistance of present counsel, made a petition for writ of habeas corpus in the federal district court contending that he was denied the effective assistance of counsel between the Petitioner's direct and cross-examination at trial when the Court ordered that he was not to confer with counsel during a fifteen-minute break in the court proceedings. (A. p. 5). On May 29, 1986, the Honorable Robert S. Carr issued his report and

recommendation that the writ [of habeas corpus] issue unless the State [of South Carolina] elects to retry the Petitioner within a reasonable period of time." (A. p. 21). In his report, Magistrate Carr opined that he was bound by the decision in U.S. v. Allen, 542 F.2d 630 (4th Cir. 1976), and Stubbs v. Bordenkircher, 689 F.2d 1205 (4th Cir. 1982) of the Court of Appeals. The Respondents made written objections to various factual findings of the report. (A. p. 22). On June 26, 1986, the Honorable C. Weston Houck issued his order rejecting the objections of the Respondents and conditionally ordering that the writ of habeas corpus shall issue. (J.A. pp. 17-19).

On November 5, 1987, the United States Court of Appeals for the Fourth Circuit, sitting en banc, reversed the judgment of the District Court and

remanded the case with directions that the Petition be dismissed. In its decision, authored by Judge Wilkinson, the Court held that Perry was not entitled to the requested relief because, under the unique facts of the case, prejudice was not shown under the standard enunciated by this Court in Strickland v. Washington, 466 U.S. 668 (1984). (J.A. p. 21). In particular, it held that there was no reason to believe that any communication which might have occurred during the brief recess at issue could have altered Perry's performance on cross - examination. (J.A. p. 31). Further, the Court stated that "there is no contention that his counsel failed to explain his rights on cross-examination to him during the many recesses in which consultation was allowed, including the luncheon recess called immediately prior

to his taking the witness stand, nor has it been argued that anything occurred during his direct examination that would have made a "refresher course necessary." (J.A. p. 31). The Court also noted the testimony against Perry as being overwhelming and the representation of his counsel team as being vigorous. (J.A. pp. 32, 33). It concluded that these factors persuaded the Court "that the possibility of prejudice is utterly remote." (J.A. p. 33). Therein, it concluded that his request for relief was without merit.

The critical issue in this case concerns whether a brief recess between the direct and cross-examination during which counsel was denied access to his client entitles him to a new trial. The record before this Court reveals that the trial began with pre-trial motions

and jury selection on September 21, 1981, and concluded on October 5, 1981. During this lengthy trial, the record reveals that there were eleven recesses during the testimony portion of the trial prior to the Petitioner's testimony on September 29, 1981. (Tr. pp. 86, 176, 213, 274, 344, 352, 421, 470, 517, 585, 663). Included in these recesses were an overnight recess from September 25-26, 1981 (Tr. p. 176), a weekend recess from September 26-28, 1981 (Tr. p. 352), and an overnight recess from September 28-29, 1981 (Tr. p. 585). Of critical importance, there was a luncheon recess just prior to the Petitioner's testimony on September 29, 1981. It is uncontested that there was no restriction on counsel's access to his client during this entire period.

On September 29, 1981, the Petitioner was called to testify. (A.

pp. 34-191). He was the third witness called by the defense. His testimony began immediately after a luncheon recess where his access to counsel was unrestricted. (A. p. 34). During his direct testimony, a brief recess was held at the request of a juror. (A. p. 76). It is uncontested that counsel had access to his client during this recess. (J.A. p. 28).

After counsel completed his direct examination of the Petitioner, a recess was ordered for fifteen minutes. (A. p. 142). After the recess was concluded, trial counsel made the following motion to the Court:

> Mr. Fairey: Your Honor, we have an additional motion for a mistrial on the grounds that we are being denied -- Mr. Perry is being denied adequate representation of counsel because I understand the Court has ordered the attorneys not to speak with him during this break.
>
> The Court: During the last break, that is true. Mr. Perry has

testified on direct examination. He was in a sense then a ward of the Court. He was not entitled to be cured or assisted or helped approaching his cross examination. I felt in fairness to the State that was proper and I accept full responsibility for it. Your motion is denied.

Mr. Fairey: I would like the record to also reflect that such instructions have not been made for any other witness in this trial.

The Court: That is correct. I'm not sure that situation has arisen up to this point in time.

Mr. Fairey: I would also --

The Court: And which it would not matter because no one is on trial but Mr. Perry and that motion would not apply. The Sixth Amendment rights apply only to one who is on trial.

Mr. Fairey: I agree with you. But I would like the record to reflect that this is the only instance during the trial that this has been done and in several cases there have been breaks between direct and cross-examination.

The Court: I'm not sure. I recall one other instance but I can't say exactly what it was. But your motion is noted, sir, and it is denied.

(J.A. pp. 4-5). The Petitioner completed his testimony that afternoon. (A. p. 190)

Immediately after his testimony, an overnight recess was held during w...ch time the Petitioner had access to counsel. (A. pp. 190-191). The record reflects that the defense further presented seventeen (17) additional witnesses during the guilt phase portion of his trial. (Tr. pp. 820-1135). During the presentation of these witnesses, the following recesses occurred in which counsel's access to his client was not restricted: the overnight recess at the conclusion of Mr. Perry's examination (A. p. 190), a fifteen-minute recess on September 30, 1981, at the conclusion of Miriam Perry's direct testimony (A. p. 192), a lunch recess at the conclusion of Miriam Perry's testimony (A. p. 194), a brief

recess at the conclusion of John Shupper's testimony (A. p. 195), an overnight recess at the conclusion of Dr. Follingstad's testimony to October 1, 1981 (A. p. 196), a brief recess for fifteen minutes at the conclusion of Dr. Morgan's testimony on October 31, 1981, at the request of counsel Fairey (A. p. 197). On October 1, 1981, the defense rested its case. (Tr. p. 1135).

During the reply testimony, there was also a brief recess waiting for a witness (Tr. p. 1158), and a lunch recess (A. p. 199). On October 1, 1981, the testimony was completed and the defense made its motions. (Tr. p. 1182). At the conclusion of these motions, there was an evening recess until the morning of October 2, 1981. (A. p. 201). After the arguments, charges, and deliberations had begun, an evening recess was held until October 3,

1981 (Tr. p. 1336).

On Saturday, October 3, 1981, the jury returned its verdict at 3:12 P.M. The jury convicted the Petitioner of murder, kidnapping, and criminal sexual conduct. (Tr. p. 1337). The jury was polled and advised that the penalty phase would begin Monday, October 5, 1981. (A. p. 202). Counsel for the Petitioner moved for a judgment n.o.v., or new trial, "based upon our lack of being able to have access to the defendant during the break taken during the Court proceedings." (A. p. 204). Pertinent inquiry was as follows:

> The Court: I don't think it's necessary. 1 will state for the record as a stipulated matter if you care to that Mr. Mullineaux did attempt to talk to the defendant during the break and he was not allowed to because of the order that I issued.
>
> Mr. Fairey: I would also like to put on the record that we were not notified as to the order prior to the order being issued. We didn't

learn of that until we attempted to talk to the defendant.

The Court: True.

Mr. Fairey: We'd also like the Court to acknowledge that we would not have tried to do anything improper with the defendant.

The Court: I'm quick to acknowledge that. No question about that.

Mr. Fairey: Yes, sir, and other than answer his questions and also to make sure he understood his rights on cross-examination.

The Court: I'm sure you gentlemen realize why I did it. Well, I don't mean for you to acknowledge it. I've already stated why I did it so you have that on the record. That's all right.

(J.A. pp. 6-7). The penalty phase testimony was begun on October 5, 1981. The Petitioner presented six (6) witnesses in mitigation of punishment. Counsel further pointed out to the Court eighteen (18) witnesses who had agreed to come to court and would have presented similar mitigation evidence.

(Tr. p. 1213). After jury charges, the jury issued its recommendation of life imprisonment for murder. The trial court then sentenced the Petitioner to thirty (30) years imprisonment for criminal sexual conduct, life for kidnapping, and life for murder, consecutive to each other. The sentence for kidnapping was vacated on state law grounds on appeal, while the conviction was affirmed.

SUMMARY OF ARGUMENT

The right to counsel is a fundamental right of criminal defendants. The right to counsel is the right to the effective assistance of counsel. It is a right to ensure true adversarial testing of the prosecution case and relates to the truth-furthering process.

An order of sequestration of the defendant during a brief fifteen-minute

recess is distinguishable from a sequestration for an overnight recess on the basis of the Sixth Amendment. This is especially true where the recess was unscheduled and it was not a time when counsel normally confers with the defendant. Under these circumstances, his right to the assistance of counsel was not impinged.

Since the Sixth Amendment concerns can be met, the review should not be subject to the per se reversal rule, but rather a review to determine if the trial was fair and reliable. Under the particular facts of this case, automatic reversal is not appropriate where the record reveals able representation by counsel and numerous recesses that allowed for adequate and diligent preparation at all times consultation normally occurs.

The record further reveals no prejudice to the defendant arising from the brief ban on consultation. Clearly, the result in the case was reliable and the trial was fundamentally fair.

ARGUMENT

The right to counsel is, without question, a fundamental right of criminal defendants. The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense." It is within the Sixth Amendment which recognized the right to counsel that the basic elements of the fair trial guaranteed by the Fourteenth Amendment are defined. Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel

plays a critical role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the ample opportunity to meet the case of the prosecution to which they are entitled. Strickland v. Washington, 466 U.S. 668, 685 (1984). That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

The Court has recognized that "the right to counsel is the right to the effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771, n. 14 (1970); Strickland v. Washington, supra, 466 U.S. at 689. U.S. v. Cronic, 466 U.S. 648, 654 (1984).

In Cronic, supra, the Court recognized the special value of the right to the assistance of counsel. It stated "of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." Cronic, supra, 466 U.S. at 654. The core purpose of the counsel guarantee was to assure assistance at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor. Id. The very premise of our adversary

system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. Id. at 656, citing Herring v. New York, 422 U.S. 853, 862 (1975).

The right to counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted, the kind of testing envisioned by the Sixth Amendment has occurred. Cronic, supra. In Herring v. New York, supra, the Court held that a defendant's Sixth Amendment right to counsel was violated by a statute under which the trial court could refuse to permit a closing argument in a bench trial. Therein, the Court reasoned that a final summation by

counsel was as basic an element of the adversarial process as a jury trial. In Brooks v. Tennessee, 406 U.S. 605 (1972), a statute requiring the defendant to testify as the first defense witness or not at all was held to deny due process by depriving the defendant of the "guiding hand of counsel" in the timing of this critical element of his defense. In Ferguson v. Georgia, 365 U.S. 570 (1961), a statute which allowed the defendant to make an unsworn statement but denied direct examination by his counsel was held to violate due process. Error was found in Davis v. Alaska, 415 U.S. 308 (1974), where a defendant was denied the right of confrontation under the Sixth Amendment to a full cross-examination by a state statute that barred use of a juvenile record to impeach an important state witness.

Obviously, the complete denial of counsel has been previously presumed to result in prejudice when it occurred at a critical stage, such as at an arraignment where a failure to raise a defense would amount to a waiver. Hamilton v. Alabama, 368 U.S. 52 (1961). Similarly, the Sixth Amendment right to counsel was held to apply where the defendant was asked to enter a non-binding plea which would be used at trial. White v. Maryland, 373 U.S. 59 (1963).

Each of the above situations related directly to the truth-furthering process as it relates to the Sixth Amendment right to counsel. In Strickland, supra, 466 U.S. at 692, the Court stated that "[p]rejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the costs." Similarly, the

Court in Cronic, supra, 466 U.S. at 659-660, stated "circumstances of that magnitude may be present on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial."

One of the circumstances cited for presumed prejudice was in Geders v. U.S., 425 U.S. 80 (1976). Geders held that a defendant's right to counsel was violated, requiring automatic reversal, when the trial court prevented him from consulting with his attorney during a seventeen (17) hour overnight recess. In its opinion, the Court emphasized the importance of the recess.

> It is common practice during such recess for the accused and counsel

> to discuss the events of the day's trial. Such recesses are often times of intensive work, with tactical decisions to be made and strategies to be reviewed. The lawyer may need to obtain from his client information made relevant by the day's testimony, or he may need to pursue inquiry along lines not fully explored earlier. At the very least, the overnight recess during trial gives the defendant a chance to discuss with counsel the significance of the day's events. Our cases recognize that the role of counsel is important precisely because ordinarily a defendant is ill-equipped to understand and deal with the trial process without a lawyer's guidance.

Geders, 425 U.S. at 88. In its opinion, the Court emphasized alternative ways to deal with the problem of "coaching" short of putting a barrier for so long a period as seventeen hours, including a direction that the examination of the witness continue without interruption. Id. at 90. More importantly, it stated:

> If the judge considers the risks high he may arrange the sequence of testimony so that the direct and cross-examination of a witness will be completed without interruption. That this would not be feasible in

> some cases due to the length of direct and cross-examination does not alter the availability, in most cases of a solution that does not cut off communication for so long a period as presented by this record ....

Id. at 90-91. The Court concluded that "the challenged order prevented petitioner from consulting his attorney during a 17-hour overnight recess, when an accused would normally confer with counsel." Id. While specifically not reaching other limitations, it held that "an order preventing petitioner from consulting his counsel 'about anything' during a 17-hour overnight recess between direct and cross-examination impinged upon his right to the assistance of counsel guaranteed by the Sixth Amendment." Id.

> A. A brief non-scheduled recess during the trial day is distinguishable from the lengthy overnight recess from a Sixth Amendment viewpoint.

The Petitioner contends that he is entitled to automatic reversal because the situation presented in Geders and the instant case are not distinguishable. We disagree. Two critical issues were presented in Geders that are not presented here. In Geders, the court was faced with an order that precluded consultation between a defendant and counsel for an extreme duration of seventeen hours overnight. Most importantly, the court in Geders emphasized that this period was a time when counsel and the defendant expected to confer and normally confer. Geders, 425 U.S. at 90-91. By dramatic contrast, the situation here was a brief recess which was unscheduled and not a time when counsel and the Petitioner expected to confer or normally confer about strategies and the day's events. Particularly illustrative of this

difference was trial counsel's statement to the Court that he wanted "to make sure he understood his rights on cross-examination." (J.A. p. 7). As the Court of Appeals held, there is no entitlement to a recess at that time and no reason to expect one. (J.A. pp. 23, 29). As stated in Geders, in a majority of instances, cross-examination follows direct examination without a break. Id. at 90. The court below noted that there was no contention that his counsel failed to explain his rights on cross-examination to him during the many recesses in which consultation was allowed, including the luncheon recess immediately prior to his taking the stand. (J.A. p. 31).

It is clear that the Court's emphasis in Geders was that to have sequestered counsel from the defendant for this lengthy period could have

affected the truth furthering process because it was at a time that normal consultation, review of strategy, and development of information usually occurred. To accept the logical extension of the Petitioner's argument would lead to a Sixth Amendment right to consult with a client between direct and cross-examination. A trial court is not required to interrupt trial proceedings whenever a defendant and his attorney express a desire to confer. The logic of Geders is that it is proper for a trial judge to direct that the examination of a witness continues without interruption until completed to avoid the possibility of coaching. Clearly then, the instant situation which allowed Petitioner to consult with counsel at all times they would normally confer or expect to confer, such as luncheon recess, or overnight recess

does not present the same type of deprivation presented in Geders. The truth-furthering process enunciated in the Sixth Amendment was not affected by the restriction over the brief recess than it would have been by the continuation of the examination. Clearly then, the length of time present in Geders and this case is constitutionally significant. We submit that the order preventing counsel from consulting with his client during the fifteen-minute recess did not impinge on his Sixth Amendment right to the assistance of counsel.

B. Under these circumstances the rule of automatic reversal should not apply because a review of the record can determine whether the trial was fundamentally fair and the result reliable.

Respondents submit that the brief sequestration should not be subject to

the per se reversal rule of Geders, supra, but should be more appropriately subjected to the test of prejudice set forth in Strickland v. Washington, 466 U.S. 668 (1984). A per se rule of reversal is "the exception and not the rule" under any circumstances. Rose v. Clark, 478 U.S.__, 106 S.Ct. 3103, 3106 (1986). Under the factual situation presented here, the per se analysis would be inappropriate because it is relatively easy for courts to evaluate the possible impact of the order on the outcome. Stacy and Drayton, Rethinking Harmless Constitutional Error, 88 Columbia L.Rev. 79, 107-110 (1988).

Under Strickland, this Court acknowledges that the focus of the Sixth Amendment right to counsel is "meant to assure fairness in the adversary criminal process." Strickland, 466 U.S. at 656. The ultimate focus of the

inquiry concerning alleged deprivations of the right to counsel "must be on the fundamental fairness of the proceeding whose result is being challenged." Strickland, 466 U.S. at 696.

Since the right to counsel is designed to promote the reliability of the verdict, harmless error analysis is an appropriate remedy unless it is inherently difficult to show that a violation of the right affected the outcome. In Cronic, the Court stated that when there was a complete denial of counsel and in situations when circumstances were present that even when counsel is available to assist, the likelihood that any lawyer could provide effective assistance is so small that a presumption of prejudice was appropriate without inquiry into the conduct of the trial. Cronic, supra, 466 U.S. at 659-660. Stated another way, prejudice

is presumed in situations "that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." Cronic, 466 U.S. at 658.

Since the purpose of the Sixth Amendment "is simply to ensure that criminal defendants receive a fair trial," the circumstances surrounding the ordered sequestration must be reviewed to determine if it is a circumstance that prejudice should be presumed. In Cronic and Strickland, the defendants contended that they have been denied their Sixth Amendment rights because they had been represented by incompetent counsel. Those situations could present circumstances when available counsel failed to timely advise his client of his rights on cross-examination, prepare defense witnesses, or generally prepare a

defense. Such a deprivation is more likely to have a prejudicial effect that the deprivation at issue here. In the instant case, consultation was allowed during the normal overnight and luncheon recesses immediately prior to his testimony. As the Court of Appeals held, "it would make little sense to maintain a per se rule of reversal for a brief restriction on consultation, but to inquire into prejudice only when Perry had been represented incompetently throughout." (J.A. p. 27). Similarly, if counsel neglected and failed to discuss or meet with his client during the recess upon client's request, the entire proceedings would be inquired into to determine the existence of prejudice.

This is not the type of error that the Court should characterize as "so devastating or inherently indeterminate"

that as a matter of law cannot be found to be harmless. Chapman v. California, 386 U.S. 18, 52, n. 7, (1967) (Harlan, J., dissenting). The Court previously acknowledged those unique situations in the right to counsel area where the interferences pose such a fundamental threat to a fair trial that prejudice is presumed. Cronic, 466 U.S. at 658-59 (1984); Strickland, 466 U.S. at 692. The existence of prejudice from a brief restriction such as this one is necessarily tied to the facts and should not be presumed to have infected the entire trial that no course other than reversal of the conviction is conceivable.

The instant situation is one in which, even with the brief recess restriction, the circumstances were not so likely to prejudice the accused that the cost of litigating their effect was

unjustified. He was represented by two strong advocates in his capital murder trial. Twenty-seven witnesses were presented by the defense. Cross - examination of the state's witnesses was found to be vigorous. It was a lengthy trial with eleven different recesses prior to his testimony, including two overnight recesses, one weekend recess, a luncheon recess immediately before his testimony, and one unrestricted break during his direct examination. Subsequent to his testimony, there were two overnight recesses and five brief recesses during the guilt phase of the case. Other recesses during the penalty phase of the trial were also held and the Petitioner presented numerous witnesses to the Court. Clearly, the situation allowed for a "reliable" verdict and a fundamentally fair trial. Depriving the Petitioner of consultation

during a brief recess when the recess was not expected or "normal" did not deprive the Petitioner of his Sixth Amendment right to the assistance of counsel. To reverse automatically a conviction because of the absence of consultation during one brief, fortuitous recess in a trial which spanned two weeks would be to confer a benefit upon a defendant who may not deserve it. (J.A. p. 29). Since the Sixth Amendment is based upon a reliable and fundamentally fair trial, the inquiry should be whether the defendant suffered prejudice and whether the trial was fundamentally fair with the ability to produce a just result. Strickland, supra, 466 U.S. 696.

C. A review of the record reveals that there was no prejudice to the Petitioner as a result of the brief bar on consultation.

The record before the Court reveals that Perry did not suffer prejudice because of the sequestration order. The Court of Appeals relied upon the standard in Strickland as to whether the defendant received a "fair trial" as to which "evidence subject to an adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of trial." (J.A. p. 31). The Court of Appeals held that there can be no legitimate fear that the trial court's order jeopardized Perry's ability to receive a fair trial and no doubt that he received the assistance necessary to justify reliance on the outcome of his trial. (J.A. p. 31).

In Chapman v. California, 386 U.S. 18 (1967), the Court rejected the argument that errors of constitutional dimension necessarily require reversal

of criminal convictions. Since Chapman, the Court has repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt. Rose v. Clark, supra, 106 S.Ct. 3105; Delaware v. Van Arsdale, 475 U.S.__, 106 S.Ct. 1431, 1436 (1986). The standard of review applied in the instant case clearly met the Chapman standard that "there can be no doubt that Perry received the assistance necessary to justify reliance on the outcome of his trial." (J.A. p. 31). Here, there was not the type of error that aborted the basic trial process, such as the use of a coerced confession or denied it altogether by complete denial of counsel or a biased judge, which cannot be held harmless.

Rose, supra, 106 S.Ct. 3106. As stated in Rose, "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless error analysis. Id. at 3107. Here, the test properly determined whether the interest in fairness has been satisfied and a reliable verdict has been presented. Contrary to the posture the Petitioner presents, "the Constitution entitles a criminal defendant to a fair trial, not a perfect one." Van Arsdale, supra, 106 S.Ct. at 1436.

The Petitioner urges this Court that to adopt the analysis of the Court of Appeals would interfere unnecessarily with the attorney-client relationship. This Court has previously held that a defendant may be forced to reveal

privileged communications to establish that his attorney was constitutionally ineffective under Strickland, or performed under an actual conflict of interest as in Cuyler v. Sullivan, 446 U.S. 335 (1980). Here, trial counsel proffered his desire to consult to discuss with him his rights on cross - examination. (J.A. p. 7). The Court of Appeals held that the total absence of prejudice made it unnecessary to address the issue of revealing confidences. (J.A. p. 34, n. 3). The issue therefore is not before the Court under these facts.

A review of the entire record reveals that the alleged error was harmless beyond a reasonable doubt to the reliability of the verdict. The Court of Appeals determined that the evidence of guilt was overwhelming. (J.A. pp. 32-33). The state evidence

revealed that his car was at the murder scene, his footprints were at the scene, and his fingerprints were on the victim's car. At one point, Perry admitted to shooting Dr. Heimberger, but contended it was an accident. Later he admitted to having sexual relations with the victim without her consent, but claimed it was under duress. A reliable and adversarial trial was held because the Petitioner took full advantage of his rights on cross-examination in placing his version of the events before the jury. (J.A. p. 31, n. 2).

The Petitioner now contends that the extended direct examination "necessitated a reminder as to the principles of cross-examination as well as reassurance to the Petitioner prior to being subjected to the prosecutor's attack." Further, he asserts that the brief sequestration likely increased the

Petitioner's anxiety and reduced his ability to deal with cross-examination. This position wholly ignores the suggestion of Geders to proceed completely through examination to avoid the prospect of coaching. Geders, supra, 425 U.S. at 90-91. The reliability of the verdict and the truth-furthering role of counsel under the Sixth Amendment were met during the trial.

D. The trial resulted in a just and reliable verdict.

In summary, the Petitioner's trial may not have been a perfect one, but it was a fair trial that resulted in a just and reliable verdict. Under our system of justice, the role of the trial is to determine the truth by the procedures it establishes. Where a reviewing court is able to say on the basis of the record developed at trial that the interest in

fairness has been satisfied and the possibility of prejudice from the alleged defect is "utterly remote," (J.A. p. 33), the judgment of conviction should be affirmed. Those requirements under the Sixth Amendment have been met.

CONCLUSION

For all the foregoing reasons, the Respondents request that the judgment of the United States Court of Appeals for the Fourth Circuit be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENTS

By: Donald J. Zelenka

June 29, 1988
Columbia, South Carolina

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No. 87-6325

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

DONALD RAY PERRY,

Petitioner,

versus

WILLIAM D. LEEKE, COMMISSIONER, South Carolina Department of Corrections, and THE ATTORNEY GENERAL OF SOUTH CAROLINA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

AFFIDAVIT OF FILING

PERSONALLY appeared before me, Donald J. Zelenka, who being duly sworn, deposes and says that he is a member of the Bar of this Court and that on this date he filed the original and forty copies of Brief for Respondents in the above captioned case by depositing same in the U. S. Mail, first-class postage prepaid, and properly addressed to the Clerk of this Court.

This 29th day of June, 1988.

Donald J. Zelenka

SWORN to before me this
28th day of June, 1988.

Kathy L. Wilder (LS)
Notary Public for South Carolina
My Commission Expires: 2-18-91.

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AFFIDAVIT OF SERVICE

PERSONALLY appeared before me, Donald J. Zelenka, who being duly sworn, deposes and says that he served the foregoing Brief for Respondents on the Petitioner by depositing three copies of the same in the United States Mail, first class postage prepaid, and addressed to W. Gaston Fairey, Esquire, P. O. Box 8443, Columbia, South Carolina 29202. He further certifies that all parties required to be served have been served.

This 29th day of June, 1988.

Donald J. Zelenka

SWORN to before me this
29th day of June, 1988.

Kathy L Wilkes (LS)
Notary Public for South Carolina
My Commission Expires: 3-18-91.